Selasih Purnama Sdn Bhd v Selaman Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24–1033–08 OF 2015
AKHTAR TAHIR J
4 MARCH 2016

Contract — Tenancy agreement — Construction of agreement — Whether agreement gave tenant automatic right to have tenancy renewed — Whether position of parties reverted to status quo when tenancy expired and new tenancy subject to offer and acceptance of terms — Whether clause in agreement that tenant first option to buy demised premises did not mean landlord to sell property to tenant at price determined by tenant — Whether landlord free to sell property to anyone offering highest price but bound to sell to tenant only if tenant offered same highest price

The plaintiff signed a tenancy agreement with the first defendant to rent the latter's property for two years. The agreement gave the plaintiff an option to renew the tenancy for another three years subject to an increase in the rent not exceeding 10% based on the market rental. The agreement also provided that if the first defendant wanted to sell the property, the plaintiff had the first option to buy it. In the instant applications by the plaintiff for orders that the tenancy had been extended and that the plaintiff had the right to exercise the first option to buy the property, the plaintiff said the first defendant did not agree to its notice for renewal of the tenancy saying that it wanted to sell the property by open tender. Three days before the tenancy expired, the first defendant notified the plaintiff that its continued occupation of the property would be as a tenant at will. Five months thereafter, the first defendant informed the plaintiff that it had entered into a sale and purchase agreement to sell the property to a third party. The plaintiff contended that the agreement gave it an automatic right to have the tenancy extended and that by entering into the sale and purchase agreement, the first defendant had breached the plaintiff's right to be given the first option to buy the property.

Held, dismissing the plaintiff's applications:

(1) Clause 9 of the tenancy agreement did not give an automatic right to the tenant to demand an extension of the tenancy. At the end of the two-year tenancy period, the status quo between the parties reverted to the original position whereby, following normal contractual principles, the tenant had to offer to renew the tenancy for another three years with the consideration being an increase in the rental and the landlord had the

right of either accepting or rejecting the offer (see para 14).

(2) That cl 9 did not confer automatic renewal of the tenancy was supported by the fact that under cl 8(f), the landlord had the right to sell the property subject to the 'tenancy herein', meaning the current tenancy and not the extended tenancy. In this case, the first defendant gave notice of intention to sell before the expiry of the tenancy. If the plaintiff had the impression that the tenancy should have been automatically renewed, it should have only agreed if the sale was not only subject to the current tenancy but also the extended tenancy and this should have been specifically stated in the agreement (see para 15).

(3) The plaintiff carried out a valuation of the property based on which it offered to buy the property at RM6.6m. This offer was not accepted by the first defendant which chose to sell the property to another party which had offered a far higher price. The option of the first right of the plaintiff to purchase only applied where everything was equal, especially the purchase price. In this case, this was not so. The first defendant was therefore entitled to sell to anyone else offering a higher price. The tenancy agreement did not give any contractual or equitable right to the plaintiff to buy the property at a price decided by the plaintiff. If, however, the plaintiff had offered the same price as the other highest buyer, which was not the case here, then the first defendant was duty-bound to sell to the plaintiff (see paras 16–17).

[Bahasa Malaysia summary

Plaintif menandatangani perjanjian penyewaan dengan defendan pertama untuk menyewa hartanah defendan pertama untuk selama dua tahun. Perjanjian memberikan plaintif opsyen untuk memperbaharui penyewaan bagi selama tiga tahun lagi tertakluk kepada kenaikan dalam sewa tidak melebihi 10% berdasarkan sewa pasaran. Perjanjian juga memperuntukkan bahawa jika defendan pertama hendak menjual hartanah, plaintif mempunyai opsyen pertama untuk membelinya. Dalam permohonan ini oleh plaintif untuk perintah bahawa penyewaan telah dilanjutkan dan bahawa plaintif mempunyai hak untuk melaksanakan opsyen pertama untuk membeli hartanah, plaintif menyatakan defendan pertama tidak bersetuju kepada notisnya bagi pembaharuan penyewaan menyatakan ia hendak menjual hartanah melalui tender terbuka. Tiga hari sebelum penyewaan tamat, defendan pertama memberitahu plaintif bahawa penghunian beterusannya di hartanah tersebut adalah sebagai penyewaan wenang. Lima bulan kemudiannya, defendan pertama memberitahu plaintif bahawa ia telah memasuki perjanjian jual beli untuk menjual hartanah kepada pihak ketiga. Plaintif berhujah bahawa perjanjian tersebut memberinya hak automatik untuk penyewaan dilanjutkan dan bahawa dengan memasuki perjanjian jual

beli, defendan pertama telah melanggari hak plaintif untuk diberi opsyen pertama untuk membeli hartanah tersebut.

Diputuskan, menolak permohonan plaintif:

(1) Klausa 9 perjanjian penyewaan tidak memberikan hak automatik kepada penyewa untuk menuntut pelanjutan penyewaan. Pada akhir tempoh dua tahun, status quo di antara pihak-pihak berbalik kepada kedudukan asal di mana, berikutan prinsip kontraktual biasa, penyewa perlu menawarkan untuk memperbaharui penyewaan untuk tiga tahun lagi dengan pertimbangan kenaikan dalam sewa dan tuan rumah mempunyai hak untuk sama ada menerima atau menolak tawaran tersebut (lihat perenggan 14).

(2) Bahawa klausa 9 tidak memberikan pembaharuan automatik penyewaan disokong oleh fakta bahawa di bawah klausa 8(f), tuan rumah mempunyai hak untuk menjual hartanah tertakluk kepada 'tenancy herein', bermaksud penyewaan masa kini dan bukan penyewaan yang dilanjutkan. Dalam kes ini defendan pertama memberi notis niat untuk menjual sebelum tamat penyewaan. Jika plaintif mempunyai tanggapan bahawa penyewaan patut diperbaharui secara automatik, ia hanya patut bersetuju jika jualan bukan sahaja tertakluk kepada penyewaan masa kini tetapi juga penyewaan yang dilanjutkan dan ini patut dinyatakan secara khusus di dalam perjanjian (lihat perenggan 15).

(3) Plaintif menjalankan penilaian terhadap hartanah berdasarkan atas mana ia tawarkan untuk membeli hartanah tersebut pada jumlah RM6.6 juta. Tawaran ini tidak diterima oleh defendan pertama yang memilih untuk menjual hartanah kepada pihak lain yang mana menawarkan harga lebih tinggi. Opsyen hak pertama plaintif untuk membeli hanya diguna pakai di mana semuanya adalah sama, terutamanya harga belian. Dalam kes ini, ia tidak sedemikian. Defendan pertama oleh itu berhak untuk menjual kepada orang lain yang menawarkan harga lebih tinggi. Perjanjian penyewaan tidak memberi apa-apa hak kontraktual atau saksama kepada plaintif untuk membeli hartanah tersebut pada harga yang diputuskan oleh plaintif. Walau bagaimanapun jika, plaintif telah menawarkan harga yang sama seperti pembeli harga tertinggi yang satu lagi, yang mana tidak terdapat di sini, dengan itu defendan pertama adalah berkewajipan untuk menjual kepada plaintif (lihat perenggan 16–17).]

Notes

For cases on construction of agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7031–7032.

Cases referred to

Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357, CA (refd)

Legislation referred to

National Land Code ss 227, 228
Rules of Court 2012 O 31 rr 1, 2

Manogar (Manogar & Co) for the appellant.
SN Nair (K Murali with him) (SN Nair & Partner) for the respondent.

Akhtar Tahir J:

THE INTITULEMENT

[1] The plaintiff sought to move the court using the provisions of ss 227 and 228 of the National Land Code and read together with O 31 rr 1 and 2 of the Rules of Court 2012.

[2] For purposes of clarity this provisions are set down in full. Section 227 reads as follows:

(1) The interest of any lessee, sub-lessee or tenant shall, whether or not it takes effect in possession, vest in him on the registration of the lease or sub-lease or, as the case may be, the grant of the tenancy.

(2) The said interest shall include the benefit of all registered interests then enjoyed with the land to which it relates.

Section 228 stipulates as follows:

(1) Any lease, sub-lease or tenancy granted under this Chapter may confer on the lessee, sub-lessee or tenant an option, exercisable at any time before the expiry of the term thereby created or its sooner determination —

(a) to require the grant to him of a lease, sub-lease or tenancy for a further term, or

(b) to purchase the reversion expectant on the existing term.

(2) Nothing in paragraph (a) of sub-section (1) of section 216 (including that paragraph in its application to any transfer by virtue of sub-section (3) of section 219 or sub-section (2) of section 220) shall render any option conferred by any oral tenancy, whether granted before or after the commencement of this Act, enforceable against any transferee of the reversion expectant thereon.

[3] Order 31 rr 1 and 2 provides as follows:

1 Power to order sale of immovable property (O 31 r 1)

Where in any cause or matter relating to any immovable property it appears necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold, the Court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

2 Manner of carrying out sale (O 31 r 2)

(1) Where an order is made, whether in Court or in Chambers, directing any immovable property to be sold, the Court may permit the party or person having the conduct of the sale to sell the property in such manner as he thinks fit, or may direct that the property be sold in such manner as the Court may either by the order or subsequently direct for the best price that can be obtained, and all proper parties shall join in the sale and conveyance as the Court directs.

(2) (There is no paragraph (2)

(3) (There is no paragraph (3)

(4) The Court may give such directions as it thinks fit for the purpose of effecting the sale, including without prejudice to the generality of the foregoing words, directions —

(a) appointing the party or person who is to have the conduct of the sale;

(b) fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;

(c) fixing a reserve or minimum price;

(d) requiring payment of the purchase money into Court or to trustees or other persons;

(e) for settling the particulars and conditions of sale;

(f) for obtaining evidence of the value of the property;

(g) fixing the security, if any, to be given by the auctioneer, if the sale is to be by public auction, and the remuneration to be allowed him; and

(h) requiring the title to be referred to a solicitor for his opinion thereon and to settle the particulars and conditions of sale.

A BACKGROUND

[4] The cornerstone of the plaintiff's application in this case is the tenancy agreement entered between the plaintiff and first defendant on 29 March 2013 for the premise known as Lot PT 5998, HS (D) 294296, Seksyen 7, Shah Alam, Selangor with the address Jalan Plumbum Q7/Q, Seksyen 7, 40000 Shah Alam ('the premise').

[5] The period of tenancy was for two years from 1 March 2013–28 February 2015. There was an option for renewal of tenancy for another three years with a 10% increase based on the market rental.

[6] A further term in the tenancy agreement was that in the event the first defendant wished to sell the property the plaintiff must be given the first option to purchase the property.

[7] The plaintiff contended that they had abided by all the obligations placed upon them under the agreement and as required had given a notice on 10 December 2014 to extend the tenancy for another three years.

[8] The defendant in reply on 17 December 2014 informed the plaintiff that the tenancy will not be extended as the first defendant was desirous of selling the premise by an open tender. A further notice was given by the first defendant on 25 February 2015 that the plaintiff occupied the premise as a tenant at will.

[9] Finally on the 31 July 2015 the first defendant informed the plaintiff that the first defendant had entered into a sales and purchase agreement for the premise with a company called Jakel Trading Sdn Bhd.

THE ISSUES BEFORE THE COURT

[10] There are two main issues before the court to determine. The first being whether the plaintiff had an automatic right of extension of tenancy for the property. The second issue is whether by entering into a sales and purchase agreement with a third party the first defendant has usurped the rights of the plaintiff to be given the first option to purchase the premise.

THE FINDING OF COURT

[11] The provisions of law as mentioned by the plaintiff in the intitulement are clearly not relevant for the purposes of determination of the issues at hand. The provisions are just general provisions and confer no rights upon the plaintiff. The actual provisions that confer any rights upon the parties can only

be gathered from considering and interpreting the terms of the tenancy agreement.

[12] In *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357, the Court of Appeal re-emphasised the rule that the courts must give effect to the intention of parties as stated in the contract. Ghazali JCA said:

> In *The Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995, Lim Beng Choon J said:
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> > In considering the disputed of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 where it is said at p 560:
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> > > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.
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> In *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p 1290:
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> > Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plan meaning of the words however much it may dislike the results.

[13] Following the above guideline to determine the intention of the parties in listing the extension clause it is appropriate to look at cl 9. Clause 9 states as follows:

> RENEWAL
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> If the Tenant shall be desirous of renewing the Tenancy herein for a second term on the expiration of the Term-hereby-granted, the Tenant shall not less than two (2) months before the expiration of the Term hereby granted give to the Landlord notice in writing of its desire and if the Tenant shall have performed and observed the terms and conditions on the Tenant's part to be performed and observed up to the date of such notice, then the Landlord will let the Demised Premises to the

Tenant for a further second term of three (3) years only (hereinafter referred to as 'the Second Term') commencing from the expiration of the Term hereby granted subject to an increase in the Rent of not mere than 10% of the Rent for the current Term but subject in all other respects to the terms and conditions as are herein contained.

[14] It is my decision that at the end of the two years tenancy period the status quo between the parties reverts to the original position whereby following normal contractual principles the tenant offers to renew the tenancy for another three years with the consideration being an increase in the rental. The landlord has the right of either accepting the offer or rejecting the offer. In short the above clause in the agreement does not give an automatic right to the tenant to demand an extension of the tenancy.

[15] My decision that cl 9 does not confer automatic renewal is supported by the fact that under the agreement itself the landlord has been given the right to sell the premise as stated in cl 8(f). Although the sale is subject to the tenancy of the plaintiff as stated in cl (g) it is subject to the 'tenancy herein'. It means that it is only subject to the current tenancy and not the extended tenancy. The first defendant in this case had given the notice of intention to sell before the expiry of the term of the tenancy. If the plaintiff had the impression that the tenancy should be automatically renewed he should have only agreed if the sale was not only subject to the current tenancy but also the extended tenancy. This should have been specifically stated in the agreement.

[16] On the next issue it is not disputed in this case that the plaintiff was given the first option to purchase the property. The plaintiff had carried out a valuation assessment of the premise. Based on the valuation report the plaintiff had offered to purchase at a price of RM6.6m. This offer price was nonetheless not accepted by the first defendant who had chosen to sell the premise to another party who had offered a far higher price.

[17] It is my decision the option of the first right of the plaintiff only applies where everything is equal especially the purchase price. In this case this was not so. The first defendant is therefore entitled to sell to anyone else offering a higher price. The tenancy agreement does not give any contractual or equitable right to the plaintiff to purchase the premise at a price decided by the plaintiff. If however they offer the same price as the other highest buyer which was not the case here then the first defendant was duty bound to sell to the plaintiff.

[18] Taking all the above factors into consideration I disallowed both the plaintiff's application for extension of the tenancy or right to exercise the option to purchase the property.

Plaintiff's applications dismissed.

Reported by Ashok Kumar